No. 91-1040

In the Supreme Court of the United States

OCTOBER TERM, 1991

PENTHOUSE INTERNATIONAL, LTD., PETITIONER

v.

EDWIN MEESE, III, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the former Attorney General and the former Members and Executive Director of the Attorney General's Commission on Pornography are entitled to qualified immunity from a civil damages action based upon the Commission's communications with various corporations concerning pornography.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a, 19a-20a) is reported at 939 F.2d 1011. The order and memorandum opinion of the district court (Pet. Supp. App. 25a-40a) is reported at 746 F. Supp. 154.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1991. A petition for rehearing was denied on September 24, 1991. Pet. App. 21a-22a. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, Attorney General William French Smith chartered a federal advisory committee known as the Attorney General's Commission on Pornography. Pet. App. 2a. The Commission was created pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*, "to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees." Pet. App. 2a; Pet. Supp. App. 32a. The Commission's inquiry included "a study of the dimensions of the problem of pornography" and "the means of production and distribution of pornographic materials * * *." *Ibid.* The Commission was given no prosecutorial, enforcement, or regulatory authority. See *ibid.*; 5 U.S.C. App. 2(b)(6), 9(b).

In May, 1985, Attorney General Edwin Meese III appointed eleven Members and an Executive Director to the Commission.[1] During 1985 and early 1986, the

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[1] The Commissioners, all respondents herein, were: Dr. Judith Becker, a clinical psychologist and professor at the University of Arizona; Diane D. Cusack, a local Scottsdale, Arizona public official; Dr. Park Elliot Dietz, a psychiatrist; Dr. James C. Dobsen, a psychologist and President of Focus on the Family; the Honorable Edward J. Garcia, United States District Judge for the Eastern District of California; Ellen Levine, Vice President and Editor in Chief of Womens Day Magazine; Harold (Tex) Lezar, a partner in the law firm of Carrington, Coleman, Sloman & Blumenthal; Rev. Bruce Ritter, the founder of Convenant House; Frederick Schauer, a Professor of Law at the Kennedy School of Government, Harvard University; Deanne Tilton, President of the Interagency Council on Child Abuse; and Henry E. Hudson, a

Commission held a series of six public hearings around the country and obtained testimony on the subject of pornography from more than 200 witnesses. Pet. App. 2a. At one such hearing, the Commission received testimony from Reverend Donald Wildmon, Executive Director of the National Federation of Decency, alleging that various corporations with "household names" distributed pornography by, among other things, selling *Playboy* and *Penthouse* magazines. *Id.* at 3a.

The Commission discussed Reverend Wildmon's testimony and decided to send a letter to the twenty-three corporations named by Reverend Wildmon, notifying them of the testimony and asking them to advise the Commission if they disagreed with it. Pet. App. 3a-4a.[2] The responses varied. One recipient

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former Commonwealth Attorney for Arlington County, Virginia and former United States Attorney for the Eastern District of Virginia. Mr. Hudson served as Chairman of the Commission. The Commission's Executive Director was Alan Sears, who is also a respondent herein.

[2] The letter, dated February 11, 1986, stated:

> Authorized Representative:
>
> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.
>
> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree

called the testimony "outrageous," while others did not respond at all. The Southland Corporation, owner of the 7-Eleven chain of convenience stores, wrote that it had already decided to stop selling "adult" magazines in light of the public concern about the effects of pornography, and it urged the Commission to delete any references to Southland in its final report. *Id.* at 4a.[3]

2. In May, 1986, Playboy Enterprises, Inc. (which publishes *Playboy*) and petitioner (which publishes *Penthouse*) filed lawsuits alleging that the Commission's letter amounted to a prior administrative restraint in violation of the First Amendment. They sought an order requiring the Commission to withdraw its letter and to take other remedial action. The district court granted Playboy Enterprises' request for preliminary relief, holding that the plaintiff had

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with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.

Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions.

Thank you for your assistance.

Truly yours,

/s/ Alan E. Sears
Alan E. Sears
Executive Director

enc: Self-Addressed
Postage Paid Mailing Label

Pet. App. 3a-4a. Neither the letter nor the enclosure identified Reverened Wildmon as the source of the testimony.

[3] Petitioner alleges that Southland's decision was influenced by a telephone communication from an unidentified Commissioner suggesting that there was a link between magazines such as *Playboy* and child abuse and that the Commission intended to publish that finding in its report. Pet. App. 4a.

shown that it was likely to prevail on the merits of its claim. *Playboy Enterprises, Inc.* v. *Meese*, 639 F. Supp. 581 (D.D.C. 1986). The district court directed the Commission to send a follow-up letter to the named corporations, advising them that the original letter had been withdrawn, that no reply was required, and that their names would not be included in the Commission's final report as distributors of pornography. The Commission complied. Pet. App. 5a.

Petitioner subsequently amended its complaint to eliminate certain claims and to add a claim for money damages under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Respondents moved the district court to dismiss the action. The court granted respondents' motion, holding that any request for further equitable relief was moot and that petitioner's damages claim was barred by the doctrine of qualified immunity because the Commission's actions did not violate any clearly established rights. Pet. Supp. App. 33a-40a.

3. The court of appeals affirmed. Pet. App. 1a-20a. The court of appeals agreed with the district court that the Commission's actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 10a (emphasis omitted), quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). The court rejected petitioner's argument that this Court's decision in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) —which invalidated a state agency's practice of proscribing "objectionable" publications and recommending prosecutions—established respondents' liability. The court of appeals noted that the "Advisory Commission had no equivalent tie to prosecutorial power

nor authority to censor publications." Pet. App. 6a-8a.

The court also rejected petitioner's argument that the Commission's letter and an unidentified Commissioner's alleged telephone conversation (see note 3, *supra*) violated the First Amendment by implicitly criticizing the *Penthouse* publication. The court explained that, even if the communications rose to the level of criticism, "when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights." Pet. App. 9a. The court added that "even if the facts of this case were to make out such a cause of action, certainly no court has ever so held." *Id.* at 9a-10a.[4]

The court found no merit in petitioner's argument that summary judgment was improperly granted before petitioner had an opportunity to pursue discovery concerning the Commission's intent in sending the letter. The court concluded that "the government's motive is irrelevant" to the First Amendment issue in this case and that the district court did not err in granting summary judgment without further discovery. Pet. App. 11a-12a. The court also concluded that the Commission's letter inquiring "into the distribu-

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[4] The court concluded that petitioner's reliance on the court's prior decision in *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985), was misplaced. In *Hobson*, the court held that FBI agents violated the First Amendment by surreptitiously publishing false information to disrupt certain political organizations. The court explained that in *Hobson*, unlike here, the defendants acted as governmental "agents provocateurs" who published false information while failing to disclose "that the government was involved at all." Pet. App. 10a.

tion of pornography" was within the scope of its authority, *id.* at 12a-13a, and that petitioner's request for declaratory relief was moot, *id.* at 14a-17a.

Judge Randolph concurred in the judgment of immunity on the basis that there is no "clearly established doctrine that the sort of governmental interference alleged here * * * violates the First Amendment." Pet. App. 18a.

ARGUMENT

The court of appeals correctly concluded that respondents are entitled to qualified immunity. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Petitioner argues that the decision below is inconsistent with this Court's decision in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) and "poses a grave threat to the First Amendment" by "[p]ermitting government officials to censor speech with which they disagree." Pet. 10. That argument incorrectly characterizes the issue in this case. The question here is not whether the court's decision promotes First Amendment values. Rather, the question is whether respondents are entitled to qualified immunity from petitioner's civil suit for damages.

This Court has already established the standard for determining whether a government official is entitled to qualified immunity. The official enjoys qualified immunity unless he has violated "clearly established * * * constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818. The "right" at issue must be "clearly established" in the "particularized" sense that "a reasonable official would understand that

what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Ibid.* (citations omitted).

As the courts below correctly held, petitioner is unable to show that respondents have violated a "clearly established" right. Petitioner errs in contending that the Commission's February 11, 1986, letter violates the First Amendment principles set forth in *Bantam Books*. The Court concluded in that case that a state agency engaged in unlawful censorship through a system of informal sanctions, including "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." 372 U.S. at 67.[5] The Commission did not engage in any such practices here. The Commission had no authority to identify "objectionable" publications or recommend prosecutions, and the letter it sent "contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications." Pet. App. 7a. Thus, *Bantam Books* does not establish that

[5] The state agency, the Rhode Island Commission To Encourage Morality In Youth, had the authority "to investigate and recommend the prosecution of all violations" of state obscenity laws. 372 U.S. at 60 n.1. It vigorously exercised that authority by notifying distributors that certain designated books were "objectionable," by informing them that a list of those publications had been "circulated to local police departments," and by following up that notification with a visit from a police officer "to learn what action [the distributor] had taken" in response to the Commission's notice. 372 U.S. at 61-63, 68.

a reasonable official would have considered respondents' actions unlawful.[6]

The other First Amendment decisions that petitioner cites are far afield from this case.[7] As peti-

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[6] As the court of appeals recognized, even if the Commission's letter could be read as criticism of petitioner's publication, the letter would not be unlawful. Pet. App. 9a-10a. As the court had previously stated, "[w]e know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content." *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986).

[7] See *Simon & Schuster, Inc.* v. *New York State Crime Victims Board*, 112 S. Ct. 501 (1991) (state statute regulating distribution of the proceeds of communicative works describing criminal activity); *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991) (regulations governing abortion counselling by recipients of federal family planning funds); *Rutan* v. *Republican Party*, 110 S. Ct. 2729 (1990) (state's use of partisan political affiliation in making hiring, promotion, transfer and recall decisions governing employees); *United States* v. *Eichman*, 110 S.Ct. 2404 (1990) (flag burning prosecution); *Ex Parte Jackson*, 96 U.S. 727 (1877) (state prosecution for violation of postal regulations prohibiting the mailing of obscene matter); *Drive In Theatres, Inc.* v. *Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff's threat to confiscate all films not rated "G" and to prosecute distributors of such films for obscenity); *Council For Periodical Distributors Ass'n* v. *Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), aff'd, 827 F.2d 1483 (11th Cir. 1987) (district attorney's threats to prosecute magazine distributors and use of other "coercive state power" to achieve suppression of publications); *ACLU* v. *City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984) (Mayor's demand that publications be removed by distributors under threat of "initiation of criminal proceedings"); *Penthouse International, Ltd.* v. *Putka*, 436 F. Supp. 1220 (N.D. Ohio 1977) (Mayor's use of municipal authority under vending concession agreement to demand removal of publications); *Hammond* v. *Brown*, 323 F. Supp. 326 (N.D. Ohio 1971) (special grand

tioner seems to recognize, the outcome in each of those cases turned on whether the government had engaged in "the suppression of ideas through the exercise or threat of state power." See Pet. 12, quoting with approval, *Block* v. *Meese*, 793 F.2d 1303, 1314 (D.C. Cir.) cert. denied, 478 U.S. 1021 (1986). That element is missing here. The Commission's letter, which was intended to give recipients an opportunity to respond to Reverend Wildmon's public testimony, did not involve suppression of ideas through the threat of state power. Rather, it allowed the recipients to express their disagreement with Reverend Wildmon's views. See Pet. App. 7a, 9a.[8]

There also is no basis for subjecting respondents to suit based on an alleged telephone call from an unnamed Commissioner to Southland Corporation informing the company that the Commission's report would link *Playboy* and similar publications to child abuse. See Pet. 3, 4, 13; Pet. App. 4a. Even if the conversation took place as petitioner alleged, the Commissioner simply related information as to the possible contents of the Commission's report. The

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jury report issued in conjunction with criminal prosecutions as a result of Kent State riot); *Liveright* v. *Joint Committee of the General Assembly*, 279 F. Supp. 205 (M.D. Tenn. 1968) (legislative investigation into "civil rights" organization using the powers of compulsory process with criminal sanctions for any failure to comply).

[8] Petitioner also mistakenly relies (Pet. 7, 10) on *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960). That case, like *NAACP* v. *Alabama*, 357 U.S. 449 (1958), "implicate[s] a separate interest—that against compelled disclosure as an infringement of the First Amendment guarantee of privacy of association and belief." Pet. App. 8a n.2. Petitioner has not alleged the infringement of such an interest and hence the case is "inapposite." *Ibid.*

court of appeals properly rejected the notion that "the truth or falsity" of the Commissioner's alleged statements could provide "a basis for a constitutional tort." *Id.* at 12a. As Judge Randolph noted in his concurrence, there is no "clearly established doctrine that the sort of governmental interference alleged here * * * violates the First Amendment." *Id.* at 18a.

The court of appeals' finding that respondents are entitled to immunity from petitioner's damages action is not only consistent with *Harlow*'s qualified immunity standard, but it is also consistent with the underlying interests that the *Harlow* standard is designed to protect. As the Court explained, qualified immunity is intended to give public officials the latitude they need to discharge their responsibilities. 457 U.S. at 814. In the case of federal advisory committees, members must be able to communicate freely with each other and the public to obtain information and input. If advisory committees and their members cannot engage in a dialogue with affected members of the public without fear of a damages suit, the committees will be of little or no benefit to the government. Pet. App. 8a.

2. Petitioner also claims that the court of appeals' decision improperly extends qualified immunity to public officials who have exceeded the scope of their discretionary authority. Pet. 18-20. In particular, petitioner points to the alleged telephone call from an unidentified Commissioner to Southland as an action that "surely exceeded the Commission's limited mandate." Pet. 19. Petitioner's challenge is without merit and does not warrant further review.

First, petitioner's charge that the alleged telephone call exceeded the scope of the Commission's authority was neither presented by petitioner in its briefs to the court of appeals nor considered by that court.

Rather, that argument was raised for the first time in the petition for rehearing. As Judge Randolph expressly observed, a court is under no obligation to consider issues that are not raised in a timely manner. Pet. App. 22a. Similarly, "[t]his Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). On that basis alone, this Court should deny review.[9]

In any event, petitioner's contention is incorrect. As the district court noted, the Commission "was given a fairly broad mandate to investigate the impact of pornography on society." Pet. Supp. App. 38a. That mandate explicitly included the study of "pornography that relates to children" as well as "a review of the available empirical and scientific evidence on the relationship between exposure to pornographic materials and antisocial behavior" and the

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[9] Petitioner cites *Cohen* v. *Cowles Media Co.*, 111 S.Ct. 2513, 2517 (1991), to suggest that the Court should consider the issue even though it was not raised below. Pet. 19 n.13. The *Cowles* decision, however, has no bearing here. *Cowles* states that "[i]t is irrelevant to this Court's *jurisdiction* whether a party raised below and argued a federal-law issue *that the state supreme court actually considered and decided.*" 111 S.Ct. at 2517 (emphasis added). The issue here is whether, as a prudential matter, the Court should review an issue that was neither raised nor decided in the court of appeals. Petitioner mistakenly relies on *Detro* v. *Roemer*, 732 F. Supp. 673 (E.D. La. 1990), for the proposition "the charge of *ultra vires* conduct cannot be resolved on a motion for summary judgment." Pet. 19. Because petitioner never presented its claim to the district court (Pet. Supp. App. 27a-40), it can hardly claim that the district court erred by not denying summary judgment on that basis.

"commissioning of new research on these subjects." *Id.* at 32a.

A telephone call discussing the possible links between *Playboy* and similar magazines to child abuse is well within the scope of the Commission's mandate. The conversation, if it occurred, is clearly "not 'manifestly or palpably beyond [the Commission's] authority.'" *Briggs* v. *Goodwin*, 569 F.2d 10, 15-16 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978), quoting *Spaulding* v. *Vilas*, 161 U.S. 483, 498 (1896).[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] See *Haynesworth* v. *Miller*, 820 F.2d 1245, 1264-1265 (D.C. Cir. 1987); *Gray* v. *Bell*, 712 F.2d 490, 505 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). See also *Gregorie* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).

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